IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 708 OF 2004

Elder Instruments
Private Limited. .. Petitioner.

vs.

Fabcon Consultants &
Engineers Pvt. Ltd., .. Respondents.

Shri Amit Jamsandekar with S. Shrivastva
i/by D.H. Law Associates for petitioner.
Shri Murtaza i/by D.L. Joshi for company.

CORAM : S.U.KAMDAR, J.
DATE : 8TH APRIL, 2005.

P.C.

. The present petition is filed for the recovery of Rs. 6,56,201.48. The said claim arises in respect of the supply and installation of Drum filling and Decanting Systems for the Silvassa Glyphosate Unit of the Monsante company. The petitioner company raised two bills being bill No. 631 dated 29/01/2002 for Rs. 307,600.00 and Bill No. 656 dated 12.2.2002 for Rs. 307,600.00. The petitioner has received the part payment of Rs. 49,937.00 and further sum of Rs. 90,000.00 has been

received against delivery. After giving credit of the said amount, according to the petitioner, there is outstanding due and payable by the respondent company of a sum of Rs. 4,75,263/-. According to the petitioner they are entitled for interest at the rate of 24% per annum amounting to Rs. 1,80,938.48. A statutory notice was given on 30.12.2002. There is no reply in respect thereof. Accordingly, the present petition is filed.

2. The respondent company has filed an affidavit dated 1.4.2004 as well as a compilation of documents inter alia contending that they are not liable to make payment to the respondent company. Three defences raised by the respondent company are as under :-

(i) Firstly it has been contended that there was delay in delivery of the goods and, therefore, the respondent company is not liable to make payment In support of the aforesaid argument the learned counsel has relied upon the correspondence which is forming part of the compilation particularly letter dated 17.7.2002 and 22.1.2002. From the correspondence it is clear that the respondent was willing and is in fact being accepting the said goods supplied by giving up the contention of delay in delivery of the goods. In fact the petitioner requested the respondent company to extend the time

of delivery schedule to 30.1.2002 which the respondent company has accepted and, therefore, in so far as the said contention is concerned that there is delay in delivery of the goods, there is no substance. Apart therefrom the respondent company was aware that there was no is delay in delivery of the goods at the time of receipt of the said goods. It was open to them to refuse the delivery of the said goods on the ground that the petitioner has committed a breach of the said terms and conditions of the contract. On the contrary the respondent company accepted the goods and, thereafter refused to make payment in respect of the same to the petitioner. In my view the ground of delay in supply of the goods is not a bonafide defence.

(ii) The second contention raised by the learned counsel for the respondent is the defective delivery in supply of the goods. Firstly the goods are not supplied to the respondent company but at their instance supply has been effected to their customer namely, Mencanto (J). The petitioners have produced the various inspection service report which are annexed to the affidavit in rejoinder. Each of the said report which has been annexed indicates that the system was checked by the petitioner in association with the said company which was using the goods and it was found that the goods are in proper and working condition. Accordingly, the

contention that the goods supplied are defective also cannot be accepted.

(iii). The third contention advanced by the learned counsel for the respondent company is that the amount is not due and payable because the petitioner did not despatch the documents for the said system including mannual. My attention is drawn to a letter dated 8.6.2002 inter alia purportedly claiming that the documents are not supplied and, therefore, the payment is not due and payable. The aforesaid contention is also totally without any merit. The goods are installed and all the documents are already supplied by the petitioner to the said company. The said company has made no grievance about non-supply of mannual. In view thereof, I find no merit in any of the contentions raised by the learned counsel for the respondent company. However, I give an opportunity to the respondent company to defend the case but on conditions of deposit. I find that the following order is required to be passed in the interest of justice.

3. The respondent company is directed to deposit a sum of Rs. 6 lacs in this Court within a period of 4 weeks from today. On such deposit being made the petitioner to file a suit within four weeks from the date of communication letter from the

advocate of the respondent company of deposit being made. If such a suit is filed the amount to stand transferred to the credit of the suit and the same to be invested in a fixed deposit with any nationalised bank initially for a period of three years and to be renewed thereafter from time to time till further orders from the Court.

4. If the amount is not so deposited within the period stipulated the company petition to stand admitted and advertised. The petitioner to deposit with the Prothonotary and Senior Master a sum of Rs. 2000/- within a period of one week from today.

5. The admission of the petition to be advertised in two newspapers namely, Free Press Journal and Navshakti and Government Gazette. On the failure of the petitioner to advertise the said petition, office is directed to advertise the same by utilising the amount deposited.

6. In an event if the amount is deposited and suit is filed by the petitioner within the period stipulated hereinabove, the respondent company will be entitled to withdraw the said amount. If such amount is deposited as aforesaid, the petition to stand dismissed.

7. Petition disposed of accordingly. No order

as to costs.